No. 3127

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

FEDERAL MINING & SMELTING COMPANY, a Corporation,
Plaintiff in Error,

vs.

ANGELO DALO,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District Court for the District of Idaho, Northern Division.

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THE ISSUES.

On January 13, 1917, defendant in error, employed by plaintiff in error as a mucker in its mine, walking along one of the floors in the underground workings, suddenly fell into and through an ore chute, and was precipitated downward through the same a distance of 30 feet, was buried with ore which fell upon him, was rendered unconscious and sustained severe and permanent injuries. The case came on regularly for trial before the Court and a jury, and verdict in the sum of $5000 was returned, upon which judgment was entered. No motion for New Trial was made or presented, and from such judgment this appeal is prosecuted upon four assignments of error: 1, that no negligence upon the part of the master is shown; 2 and 3, upon claimed error in the refusal to give two requested instructions, and 4, the rejection of the proffered evidence of a physician called by defendant which was rejected upon the plaintiff's claim of privilege.

The case will be discussed regularly as presented under the respective assignments.

THE FACTS.

Defendant in error, while walking along one of the floors in an underground tunnel of the under-

ground workings of the mine of plaintiff in error, which was unlighted save by the miner's lamp carried by defendant in error, suddenly fell into a chute which extended downward from the 6th floor, a distance of 30 feet. The floor of the tunnel where the chute existed was filled from wall to wall with a large pile of ore (Tr. 51) completely covering the chute opening so that it was impossible to tell under what part of the pile of ore the chute existed (Tr. 49-52). Numerous men working in the mine, including defendant in error, had for twelve days prior to the accident passed over the ore which completely covered the floor and the opening of the chute, forming a beaten pathway (Tr. 50); the ore had been mucked into the chute and upon the floor around and above the chute by other employees (Tr. 63); defendant in error had not mucked or placed the ore there and had nothing to do with it (Tr. 63); the chutes were drawn from below by other employees and the ore transported from the mine and he had nothing to do with drawing the chutes, nor removing the ore from them. Frequently when the chutes were drawn, the top portion of the ore would not fall, and for the purpose of loosening the ore which did not fall plaintiff in error employed a chute tender (Tr. 76-77). The chute was

drawn at 8:30 A. M. on the morning of the accident (Tr. 79) from a point two floors below the 6th floor (Tr. 79) but only part of the ore fell and the ore upon the floor and over the top of the chute on the 6th floor was not moved and did not fall (Tr. 79). Defendant in error knew nothing of the fact that the chute had been drawn. As defendant in error passed along the 6th floor he walked upon the ore at the only place where under the circumstances he could walk (Tr. 71) and upon the same place where he and other employees, including the foreman of the plaintiff in error, had walked for a period of twelve or fourteen days before the accident. Defendant in error was not warned of the dangerous condition of the floor at the place where he was required to walk. The chute tender, whose duty it was to keep the chutes free from more and to prevent their hanging up, failed to clear the floor and the chute in question.

ARGUMENT.

The whole theory of the argument of plaintiff in error upon the first assignment, headed, "The master was not negligent" (Brief p. 5) is based upon the proposition that the matter of chutes hanging up was such an "unusual occurrence" that

the master was not bound to take any precautions to protect its employees against a danger which was not and could not be anticipated. They concede, however, the rule to be, that if the master knew, or by the exercise of ordinary care should have known of the danger, or that such a length of time elapsed between the time that the dangerous condition arose and the time of the accident, in which the master exercising ordinary care should have discovered, and have either removed or warned the employee of the danger, then a liability would exist (Brief p. 6). All of the cases cited by counsel deal with dangerous situations arising during the progress of work, which on account of their infrequency the master could not anticipate, and which conditions unknown to the master existed for but a short period before the accidents complained of. The cases cited enunciate elementary principles of law, based upon specific facts in each case, which can have no force or effect in the case at bar, and counsel's entire argument being based upon the lack of knowledge on the part of plaintiff in error that chutes hung up after the bottom parts had been drawn, and that it was not obliged to anticipate and provide against a danger of which it had no knowledge, we are compelled to quote from the

record some features of this case which will immediately demonstrate that this case is argued upon a state of facts entirely opposed to the facts involved, and that the true state of facts renders inapplicable every case cited by plaintiff in error.

At Transcript 64 it is sought to be shown that defendant in error knew that it was customary for ore chutes to hang up. At Transcript 66 an effort is made to show that defendant in error knew that a man was employed as a chute tender, whose sole duty was to loosen the chutes which hung up; at Transcript 64 plaintiff in error sought to show that defendant in error himself had drawn chutes that had hung up; Transcript 77-78 show that the plaintiff in error employed a man whose sole and exclusive duty was to draw and loosen chutes which became clogged and hung up. The chute tender was under and subject to the orders of one Brown, the foreman (Tr. 80).

But counsel have evidently overlooked the admitted facts in this case—paragraphs 11 and 12 of the complaint (Tr. 11-12) allege the knowledge upon the part of plaintiff in error of the dangerous conditions existing by reason of ore chutes being filled and hanging, and paragraph 9 of the answer (Tr.

19-20) admits such knowledge upon the part of plaintiff in error, and from page 20 of the printed transcript we quote as follows:

> *"And the said plaintiff well knew that ore chutes frequently hung up and had to be loosened,* and that by reason of the ore hanging up in said chutes that *the defendant employed a man on the said level whose duty it was to loosen the ore in the chutes so that it would drop down,* and the defendant further alleges that plaintiff was familiar with the drawing of ore chutes and had been employed by the defend *to loosen chutes that were hung up,* and that the plaintiff well knew, or ought to have known, that the top of the said number 7 chute was liable to be hung up and the ore drawn from below and that it was dangerous for the plaintiff to step upon the top of the said number 7 chute or *upon the top of any ore chute containing ore and waste."*

And on page 26, paragraph 2 of the affirmative defense pleaded in the answer, we find the following allegations:

> "And knowing that chutes of this kind frequently became hung up so that the upper portion of the chute would not drop down and if loosened by pressure or otherwise, might suddenly drop, and might carry any person who might be standing thereon."

The language of the Court in passing upon a question of law occurring during the trial at Transcript 184 is quite pertinent:

> "But here is a case where the danger is an obvious one, that if the ore did hang up there the condition was such as to be perilous. *It is a condition that ought to have been provided against.* The precautions ought to have been reasonably adequate to prevent the occurrence of such a peril."

The Court must bear in mind that no claim is made that the chute tender, whose duty it was to keep the chutes free from ore, was a fellow servant of defendant in error. No such claim was pleaded, no such contention was made during the trial, nor is such a question raised upon this appeal.

Under the state of the record. and in view of the fact that upon this phase of the case the jury was instructed fairly and fully as to the law applicable, and no exception was taken or preserved to the instructions given, this Court must hold that no error was committed. The record evidences the existence of a dangerous and perilous passageway over which defendant in error was required to walk, a knowledge of such danger upon the part of the plaintiff in error, no knowledge on the part of defendant in error, and an absolute lack of any precaution of any kind being taken by plaintiff in error for his safety.

II.

DEFENDANT'S REQUESTED INSTRUCTION NO. 1.

The assignment of error is not discussed seriously, and plaintiff in error in the brief asks that the matter be considered in connection with its third assignment, and our discussion of that assignment will cover the two questions. However, in passing, we might suggest the Court in passing upon its refusal to give this requested instruction, gave his reason for such refusal in the following language:

The Court: "I think the general instruction I have given is as far as I should go on that particular point" (Tr. 233). "I think in the main they are covered in the general instruction" (Tr. 233).

The general instructions covered every phase of the case and no exception was taken or preserved (Tr. 233).

The instruction requested, quoted at p. 19 of the brief, would have the Court charge the jury that the "plaintiff in this case does not claim that the defendant mining company was negligent in not warning the plaintiff of the possibility of the chutes hanging up on the floor, etc."

This instruction containing as it does an incorrect

and untrue statement of the facts, it was not error to refuse it. That it does not embrace the facts we call your Honors' attention to paragraph eleven of the complaint (Tr. 11 and 12) in which it is specifically alleged that the defendant

> "negligently and carelessly failed to take any precautions, give any warning or notice, etc."

and to paragraph 12 of the complaint (Tr. 12) alleging the defendant's knowledge of the dangerous conditions existing and its failure to warn the plaintiff of the same.

The whole situation was fairly presented to the jury by instructions so complete and fair that not a single objection or exception was taken or preserved.

III.

Plaintiff in error complains of the refusal of the Court to give its instruction No. 2, which reads as follows:

> "You are instructed that before you can find defendant guilty of negligence in failing to discover and remove the danger which resulted in plaintiff's accident and injuries, you must first find that, in view of all the circumstances in the case, sufficient time had elapsed before the accident to enable the defendant in the

exercise of ordinary care to have discovered and removed the danger."

And counsel for plaintiff in error argue in their brief that before the jury could have found the defendant guilty of negligence, it ought to have determined as to whether or not it had sufficient time to enable it to discover the danger of the place where plaintiff was injured in time to have removed the danger. We insist that the Court fully covered this question in its general instructions. It is not error for the Court to refuse to give instructions to the jury in the express language of requested instructions. So long as the subject is covered so that the jury can apply the law as given it by the Court to the facts of the case, this is sufficient.

As to whether or not the defendant had a reasonable time in which to discover and remedy the defect, this is a question of fact for the jury to be determined by it like every other fact. It all goes to the question of the exercise by the defendant of reasonable care to keep and maintain a place in a reasonably safe condition for the use of its servants. Even if sufficient time had elapsed for the defendant to discover and remedy the dangerous situation, this would not be conclusive on the jury as establishing negligence. A great many other things must be

taken into account and into consideration by the jury, and we insist that the Court's general instructions cover not only this question, but all other questions affecting reasonable human conduct. The instructions given by the Court on this question are as follows:

> Pages 224 and 225 Tr.:
> "Generally the first inquiry, and here the first inquiry, touches the question of whether or not the defendant company was negligent substantially in the manner and form alleged in the complaint. Generally speaking, one is negligent who does not, under the circumstances, use the care which an ordinarily prudent person, with due regard for the safety of another, would have used under those circumstances, or who has done something which, under like circumstances, an ordinarily prudent person, with due regard for the safety of another, would not have done. * * * Upon the other hand, if the defendant company failed to exercise that degree of care, then it would be chargeable with negligence. * * * * * * More specifically in this case it is charged that the defendant was negligent in that it failed to perform the obligations which every employer owes to its employee, and that is, to use reasonable care to see that the place where the workman is called upon to perform his duties *is in a reasonably safe condition.* * * * * That obligation implies the duty to see that the place is reasonably safe in the first place, and then, *by the exercise of reasonable care, in the way of inspection and repair, to see that the place is kept or maintained in a reasonably*

*safe condition. * * * * Such dangers as arise, or such dangerous conditions as occur in the course of the work, as a result of the work itself cannot always be provided against or at once corrected."* Ours.

The Court will see that this instruction clearly charges the jury that the defendant is not charged as an insurer, neither is it charged with doing anything but the exercise of reasonable care to discover and remedy dangerous situations and conditions. Now, under the instructions, the jury could have found, if it saw fit to do so, that, under all of the circumstances in the case, three hours' time intervening between the time the ore chute was drawn and the time of this accident was not a reasonable time under all the circumstances and conditions, and the jury could take into consideration the general manner and method of mining operations and the inability of the company to always have a man watching out for dangerous conditions developing during the progress of the mining operations. On the other hand, the jury could find that on account of the peculiar knowledge which the mining company must have had of the danger of ore being hung up in the chutes, it ought to have anticipated that this might happen to this particular chute, and that three hours' time was sufficient,

in the exercise of reasonable care by defendant, to have inspected and discovered the fact that the ore chute was hung up. Again we contend, that the specific instruction requested could have been very misleading to the jury, in that they might have understood that the only thing they could decide, in determining whether or not the defendant had used reasonable care was as to whether or not sufficient time had elapsed between the chute being drawn and this accident to enable it to discover the dangerous conditions, and upon the familiar rule that "the mentioning of one thing impliedly excludes all other things," the jury might have eliminated every other fact and circumstance which intended to show either want of ordinary care, or the exercise of it.

We insist that the jury could not have been mislead by the failure of the Court to give the specifically worded instruction requested; that the instruction given was much more favorable to defendant, although couched in broader terms than was embraced in the requested instruction.

IV.

Under this subdivision (brief 30) plaintiff in error discusses the alleged error of the Court in sus-

taining the objection made to the introduction of the testimony of Dr. Rolfs. That the precise point may be properly presented, we refer to the record briefly as follows:

Dr. Rolfs was called by plaintiff in error for the purpose of testifying with reference to information gained by him while attending defendant in error professionally at a time prior to the infliction of injuries which formed the subject matter of this action. He testified upon voir dire (Tr. 145) that he was, at the time inquired about, attending and treating the defendant in error professionally, and that the information sought to be elicited was based upon information gained by him while conducting an examination of defendant in error for the purpose of enabling him to treat him. This relation was conceded by plaintiff in error (Tr. p. 146).

The specific objection made (Tr. p. 146) was that the information sought was privileged under the Idaho statute.

The objection was sustained and such ruling is assigned as error.

Section 5958 of the Revised Codes of Idaho provides as follows:

> "There are particular action in which it is the policy of the law to encourage confidence and preserve it inviolate. Therefore a person cannot be examined as a witness in the following cases:
>
> 4—A physician or surgeon cannot, without the consent of his patient, be examined in civil actions as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for his patient."

Plaintiff in error contends that because defendant in error testified upon the trial as to his injuries he waived the privilege. There is no claim made, nor could it be, that defendant in error testified to any relation of any kind with Dr. Rolfs, nor to any information given him by Dr. Rolfs, nor did he testify to anything other than the physical infirmities from which he suffered as a result of the accident in question.

Plaintiff in error quotes extensively from general treatment of the subject by Wigmore, but, counsel relying to such an extent upon such authority (brief 31-32-33-34) have, for some reason, failed to include the further fact that the learned author himself concedes that the settled law of the land is otherwise. The statutes of the states and the unvarying current of authority demonstrate that the claim of error here made cannot be supported.

Your Honors must bear in mind the distinction that arises, where legitimate claim of waiver may be justly raised, in the class of cases cited by plaintiff in error under stipulation and agreements in the insurance cases where the insured stipulate and agree not to claim privilege, and cases where the injured party offers in evidence oral or written statements of the physician as to his physical condition. Such cases have no application to the facts in this case. Cases from a great majority of the states might be cited, but for the purpose of brevity we respectfully refer your Honors to a very illustrative case upon the subject, where Justice Sanborn has collected a large number of cases which sustain our position.

See *Union Pac. R. Co. vs. Thomas,* 152 Fed. 365-367.

At page 368 it is said:

> "Another position of counsel for the company is that the plaintiff waived her privilege because she testified to the communication, and thereby rendered the evidence of the physicians competent. Testimony voluntarily produced on behalf of a patient or a client of communications between him and his physician or his attorney undoubtedly waives his privilege and exempts the evidence of the physician or attorney relative to the communication

from all objection on the ground that is it confidential or privileged, because the patient or client has thereby made it public. Hunt v. Blackburn, 128 U. S. 464, 470, 9 Sup. Ct. 125. 32 L. Ed. 488. But the reason for this rule is that the patient or client has deprived the communication of its confidential character by voluntarily causing it to be recited in public. Testimony that is not voluntarily given and evidence that does not recite the communication works no waiver, because the reason for the rule there ceases, and the rule becomes inapplicable. Burgess v. Sims Drug Co., 114 Iowa 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359."

And at page 369 the following is found:

"Counsel have cited in support of their claim of waiver here the argument of Prof. Wigmore, in section 2389 of the third volume of his work on Evidence, that the law ought to be that the commencement of an action on account of a physical ailment or the voluntary testimony of the plaintiff to his physical condition is a waiver of his privilege to prevent his physicians from testifying concerning them. Suffice it to say that the learned author himself concedes, and the statutes of the states and the unvarying current of authority demonstrate, that the settled law of the land is otherwise. Williams v. Johnson, 112 Ind. 273, 13 N. E. 872; McConnell v. Osage, 80 Iowa 293, 45 N. W. 550, 8 8 L. R. A. 778; Green v. Nebagamain, 113 Wis. 508, 89 N. W., 520, 521. The only other authority brought forward to sustain the waiver is Sovereign Camp of Woodmen of the World v. Grandon, 64 Neb.

> 39, 89 N. W. 448, a case in which the introduction by the plaintiff of a written statement by the physician of the condition of the patient was held to be a waiver of the privilege to object to his testimony to that condition, a proposition which is conceded, but which has no application to the facts of this case."

The fallacy of the position of plaintiff in error is best demonstrated by a brief discussion of the cases cited in the brief, beginning at page 34.

The first case, Lane vs. Boycourt, 27 N. E. 1111, is quoted from upon three pages of brief. A reading of the case will demonstrate it was a malpractice case instituted against the attending physician. Plaintiff and her relatives testified as to the claimed negligent acts of the defendant committed at the time of the operation which plaintiff claimed was negligently performed. Defendant testified fully, giving his version of what occurred without objection, and called Dr. Williamson, who assisted at the operation, and objection was made to his testimony. Upon such a state of facts plaintiff clearly waived the right to later claim privilege. but the distinction in such a case is readily apparent.

The case of Reinan vs. Dennin, 9 N. E. 3204, erroneously cited in brief 36, should be page 320,

and in this case the Court of Appeals of New York sustains and affirms the action of the lower court in rejecting the proffered evidence of an examining physician under the New York statute. The case was no doubt cited without reading it, as the views expressed are directly contra to the contention of plaintiff in error.

There is no such case as Morris v. N. Y. O. & W. Ry. 42 N. W. 410 (N. Y.), cited at brief 36, nor is there such a case as In re Burnett, 55 Pac. 575 (cited brief 36).

The case of State vs. Long, 165 S. W. 749 (brief 36), which counsel say is too lengthy to quote from, was a criminal case, involving the crime of seduction. The state claimed privilege—not the patient—and the Supreme Court of Missouri held the statute of that state gave the right to claim privilege solely to the patient.

The balance of the brief upon this subject deals with a host of cases from the Supreme Court of Oklahoma, and the reasoning of that court is against the weight of authority.

The case of Hunt vs. Blackburn, 128 U. S. 464, 32 L. Ed. 488 (brief 43) serves to further illustrate the fallacy of counsel's position where a

plaintiff testified fully as to what transpired between herself and her attorney and then sought to close the mouth of the attorney from giving his version of the facts by claiming privilege, and the case of U. P. Ry. Co. vs. Thomas, 152 Fed. 365 (brief 43) is a case upon all fours against the contention here made and has heretofore been cited by us in this brief and quoted from extensively.

The statute of Idaho, under which this question was raised, has heretofore been passed upon by the Supreme Court of Idaho.

See:

Jones vs. City of Caldwell, 20 Idaho 5; 116 Pac. 110.

Jones vs. City of Caldwell, 23 Idaho 467; 130 Pac. 995.

Brayman vs. Russel & Pugh Lbr. Co., 169 Pac 932-934, Dec. 27, 1917.

In the Jones case, supra, twice before the Supreme Court of Idaho, because of the error of the lower court in admitting the testimony of a physician, which was objected to, the theory of counsel in the case at bar is repudiated. In that case the

plaintiff called one of the physicians in attendance, but did not call the other. The defendant then called as a witness the other physician who assisted at the operation. Plaintiff objected upon the ground of privilege, which was overruled by the Trial Court, and this action of the court was held error, and a new trial was granted by the Supreme Court. The same contention was made by the respondent (defendant below) as is here made that the plaintiff by calling one of the physicians to testify waived the right to object to the testimony of the physician who assisted in the operation. This situation presents the precise question which is raised in this case, and the respondent there relied upon the authority of Wigmore on Evidence and the same quotation was made from that author that is found in the brief in this case.

The Court said:

> "In the last sentence the author concedes that his views there expressed are generally not conceded by the decisions of courts of last resort. However, the legislature in this state enacted said section 5958, which provides, among other things, that a physician or surgeon cannot, without the consent of the patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or to act for the patient. *If the provisions of*

that section result in the suppression of truth, this Court has not the power or the authority to repeal said statute by judicial decision. (Ours).

As sustaining the view that a plaintiff may waive his privilege in regard to one of his physicians and not waive it as to another, see Hope v. Troy, etc., Ry Co., 40 Hun, 438; Record v. Village of Saratoga Springs, 46 Hun. 438; St. Ry. v. Shephers, 30 Ind. App. 193, 65 N. . 765; Baxter v. City of Cedar Rapids, 103 Iowa 599, 72 N. W. 790; Dotton v. City of Albion, 57 Mich. 575, 24 N. W. 786; Mellor v. Mo. Pac. Ry. Co., 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; Metropolitan St. Ry. Co. v. Jacobi, 112 Federal, 924, 50 C. C. A. 619. It was held in Pa. M. Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769. that the examination by the plaintiff of one physician is not a waiver of the privilege as to any other physician. Williams v. Johnson, 112 Ind. 273. 13 N. E. 872.

We conclude that the decided weight of authority is in favor of the view that a waiver of the privilege as to one physician does not waive the privilege as to any other physician. It is also very clear that our statute forbids and prohibits the examination of a physician without the consent of the patient, and this privilege extends to the *individual witness,* and not to the *consultation* or *transaction* in which he was a physician. In other words, each individual physician is a witness within the meaning of this statute, rather than a number of physicians who may be present or participate in a consultation, being treated as one witness, as appears to be done by Prof.

> Wigmore. As we view it, the plaintiff did not waive the privilege so far as Dr. Stewart is concerned, by calling Dr. Miller to testify for her, and, if the provisions of said section 5958 resulted in the suppression of truth, that is a matter for legislative consideration. Counsel for defendant contends that Dr. Stewart was called to testify as an expert, and that his evidence should have been given to the jury for that reason. By calling a physician as an expert, the provisions of said section 5958 cannot be evaded and the witness permitted to base his opinions on information acquired while attending the patient. *If that were permitted, the provisions of said statute would be without force or effect.*" (Ours.)

The Brayman case, supra, just decided by the Supreme Court of Idaho, reviews the earlier decisions of that state, approves of the Jones case, supra, and quotes from the Supreme Court of California. (McCrea vs. rickson, 1 Cal. App. 326, 82 Pac. 209), where the statute of that state, identical with the statute of Idaho, is construed, in a case where the same contention as raised here, was considered, and the question is decided adversely to the position taken by plaintiff in error in the case at bar.

Thus the Supreme Court of Idaho having judicially determined the applicability of the statute involved, its holding should be conclusive, and the

statute cannot be repealed by judicial decision.

What we have said upon this subject should be decisive of the question, but the precise question has been passed upon by the Supreme Court of the United States in the case of Arizona & N. W. R. Co. vs. Clark, 235 U. S. 669; 59th L. Ed. 415-418, and in the dissenting opinion by Justice Hughes (page 420) will be found the identical cases which plaintiff in error has extensively cited and quoted from, but the majority opinion, and the cases there cited are not referred to or mentioned.

Another suggestion which might be made in passing is that no motion for New Trial was here made or presented, and no question is raised as to the amount of the verdict. The proffered testimony of Dr. Rolfs referred solely to the question of defendant in error wearing a truss before the time of the injury complained of. There was substantial evidence of serious injuries other than hernia claimed and proven, and the proffered testimony referring solely to one of the conditions claimed could not in anywise have affected the verdict in the face of the fact that no claim is made that the verdict is or was excessive.

We respectfully pray an affirmance of the verdict and judgment.

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